IN THE

Supreme Court of the United States

October Term 1920

Original No. 24

IN RE THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY,
Petitioner.

BRIEF

IN OPPOSITION TO THE PETITION.

THOS. H. TRACY,
GEO. D. WELLES,
Solicitors for The Toledo, St. Louis & Western Railroad Company and Amici Curiae.

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LIST OF CASES CITED

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STATEMENT OF THE CASE

Horatio C. Creith filed a creditors' bill on behalf of himself and all other creditors of The Toledo, St. Louis & Western Railroad Company in the District Court of the United States for the Northern District of Ohio, Western Division. That court appointed a receiver of all of the company's property, appointed a special master, enjoined all other suits against the company and its property, and gave all creditors leave to file their claims before the special master or to inter-

vene. Merrill, et al, as a committee under a bondholders' protective agreement, intervened and filed a cross-bill, asking for a personal judgment against the company on certain collateral trust bonds, series "A" and "B". Jules S. Bache, et al, a committee of stockholders of The Toledo, St. Louis & Western Railroad Company, answered the bondholders' cross-bill. This answer alleged that the bonds had been issued as a result of a fraudulent conspiracy between The Chicago, Rock Island & Pacific Railway Company (hereinafter referred to as the Rock Island Company) and one of the officers of the Toledo, St. Louis & Western Railroad Company, and were, therefore, void. The issues as to the validity of the bonds raised by these pleadings and others were referred to the special master above mentioned. Upon the hearing before him the Rock Island Company, in its own name and by its own separate counsel, appeared and exercised all the rights of an intervening party. Counsel of record for the bondholders' committee upon this hearing disclaimed that they represented the Rock Island Company.

The Rock Island Company still owns $5,447,000.00 of the bonds which were issued in pursuance of the fraudulent conspiracy above mentioned, and has disposed of $6,080,000.00 par value of bonds of the same issue to persons who now claim to be inno-

cent holders for value, most of whom are represented by the Bondholders' Committee.

After the Rock Island Company had intervened for the assertion and protection of its own rights as a bondholder, as above stated, the District Court granted an application of The Toledo, St. Louis & Western Railroad Company for leave to file a cross-bill against the Rock Island Company. This cross-bill alleges the fraud of the Rock Island Company, above mentioned, in detail, asserts that The Toledo, St. Louis & Western Railroad Company will be damaged as a result of the fraud of the Rock Island Company to the extent of any amount which it may be required to pay to innocent bondholders, and seeks a recovery over against the Rock Island Company of whatever amount The Toledo, St. Louis & Western Railroad Company may be compelled to pay to innocent bondholders, and of $1,000,000.00 paid out as interest on said bonds, while it was in ignorance of the fraud.

Notice of the filing of this cross-bill was served (in accordance with Equity Rule 31) on the solicitor who had prior thereto appeared in behalf of and conducted the litigation for the Rock Island Company and was acknowledged by him as "Solicitor for The Chicago, Rock Island & Pacific Railway Company." Upon proof of this service and after hearing evidence, the

District Court held upon the evidence that the Rock Island Company had entered its appearance and had become a party to the suit, and that the cross-bill raised issues which were proper in the pending suit. The District Court therefore fixed a time (ten days) for the Rock Island Company to answer the cross-bill of The Toledo, St. Louis & Western Railroad Company.

Within the time so fixed the Rock Island Company filed a motion in which it asked the District Court to vacate its order requiring the Rock Island Company to answer, "On the ground that the court was without jurisdiction to make said order or over this defendant as a party to said cross-bill."

The court heard evidence on this motion as to whether the Rock Island Company had entered its appearance and become a party, and again found that the Rock Island Company had entered its appearance and become a party and overruled the motion. The Rock Island Company thereupon filed another motion by which it moved the court "To dismiss so much of said cross-bill as seeks to recover moneys from The Chicago, Rock Island & Pacific Railway Company, upon the ground that it is not suable in this suit or in this district upon said pretended cause of action, not being an inhabitant of the district or of the State of Ohio, and

neither it nor the cross-complainant being a resident of the district or state."

This motion the court also overruled after hearing evidence. The Rock Island Company then answered, and by this answer admitted that it owned $5,447,000 of the bonds in controversy and alleged that same had been deposited with the bondholders' committee, and admitted that the vice-president of The Toledo, St. Louis & Western Railroad Company received from the Rock Island Company the amount which the cross-bill alleges was paid as a secret and fraudulent commission by the Rock Island Company.

Without having preserved any record for reviewing the proceedings below by appeal or in error, the Rock Island Company has applied to this court for a writ of prohibition or mandamus directed to the District Court to restrain further proceedings against it upon the cross-bill of The Toledo, St. Louis & Western Railroad Company. This petition is not accompanied by any record of the evidence heard below. To the rule to show cause, issued upon the filing of this petition, the District Court has made a return showing that the decisions of which petitioner complains were made, as above stated, upon evidence, and as a result of the exercise of the judicial discretion of the District Court in applying the law to the facts as found by it.

The brief for petitioner contains argument and authorities from which we deduce that petitioner claims a writ should issue herein for the following alleged reasons:

(*a*) Because the District Court as a Federal Court has no jurisdiction of the claim of The Toledo, St. Louis & Western Railroad Company for recovery over against the Rock Island Company, neither company being a resident of the Northern District of Ohio.

(*b*) Because the District Court had no jurisdiction over the person of the Rock Island Company, no process having been issued for that company.

(*c*) Because the District Court was in error in holding that the Rock Island Company had entered its appearance in the action.

(*d*) Because the District Court had no jurisdiction to compel the Rock Island Company to meet issues tendered by a cross-bill filed subsequent to the time the Rock Island Company became a party, if it did become a party.

ARGUMENT

The petitioner asks in the alternative for the issuance either of a writ of prohibition or of mandamus to

the District Court. Writs of prohibition do not issue to the District Court except in cases of admiralty and maritime law.

Ex parte Graham, 10 Wall. 541-2-3;
Ex parte Easton, 95 U. S. 68-72;
In re Massachusetts, 197 U. S. 482-488;
Ex parte Christy, 3 Howard 292-322.

In other cases mandamus and not prohibition is the proper remedy where it is claimed the District Court has usurped jurisdiction. (*Ex parte Wisner*, 203 U. S. 449.)

Neither remedy will issue in any case to control the judicial discretion of the District Court, to compel it to decide a question within its jurisdiction in any particular way, to serve the purpose of an appeal or writ of error for the correction of errors or irregularities in its proceedings, or to review its judgment on the facts in a case of a class in which it has power to pass upon the facts.

That the foregoing states the rule as to prohibition is established by:

Smith and Whitney, 116 U. S. 167-176;
Ex parte Ferry Co., 104 U. S. 519-520;
In re Fassett, 142 U. S. 479-486;
Ex parte Christy, 3 Howard 292-308;
Ex parte Pennsylvania, 109 U. S. 174.

That the same rules hold true in mandamus is established by:

In re Atlantic Railroad, 164 U. S. 633;
In re Huguley Mfg. Co., 184 U. S. 297-301;
In re Key, 189 U. S. 84;
In re Morrison, 147 U. S. 14-26;
Ex parte American Steel Barrel Co., 230 U. S. 35-45-6.

We direct particular attention to *In re Atlantic Railroad, Supra*, and to *In re Huguley Mfg. Co., Supra*, in each of which objections had been made to the jurisdiction of the District Court and overruled by that court, and in each of which it was held that there being an adequate remedy by appeal mandamus should be denied.

The statement quoted in the brief for petitioner at page 2 from *In re Winn*, 213 U. S. at page 467 "An appeal or writ of error at the end of long and expensive proceedings which must go for naught if the District Court is without jurisdiction is not an adequate remedy," is expressly disapproved and overruled in *Ex parte Harding*, 219 U. S. 363, 377-379, where the earlier decisions of the court are reviewed and discussed at length.

The real question therefore presented by the present proceeding is this: Has the court below made orders which it is apparent it could have no power to make in any circumstance in a case of the character of the pending suit? If the answer to this question is "yes," the writ should issue. If the answer is "no," the writ should not issue. Stated concretely, if it is within the power of a District Court proceeding upon a creditors' bill to find upon evidence that another creditor has intervened and become a party, and to order, (*a*) that the original defendant may file a cross-bill against such intervenor, and (*b*) that the intervenor must answer the cross-bill or suffer a decree *pro confesso*, then it follows that this court will not interfere with the court below by prohibition or mandamus.

We submit that the mere statement of this situation carries the answer to the question. A court of equity certainly has jurisdiction to determine whether a creditor of the defendant named in a creditors' bill has intervened and entered his appearance.

Equity Rule 37 provides:

> "All persons having an interest in the subject of the action, and in obtaining the relief demanded, may join as plaintiffs, and any person may be made a defendant who has or claims an interest adverse to the plaintiff. Any person may, at any time, be made a party if his pres-

ence is necessary or proper to a complete determination of the cause. Persons having a united interest must be joined on the same side as plaintiffs or defendants, but when anyone refuses to join, he may, for such reason, be made a defendant.

"*Anyone claiming an interest in the litigation may at any time be permitted to assert his right by intervention,* but the intervention shall be in subordination to, and in recognition of, the propriety of the main proceeding."

The decision of a court upon the question as to whether there has been an intervention upon the record before it, may be right or it may be wrong, but right or wrong it is a matter within the jurisdiction of the court to decide, and, having been decided, the issue is set at rest unless and until the decision is reversed by proceedings on appeal or writ of error.

That a court of equity has jurisdiction to authorize one party to a suit before it to file a cross-bill directed against another party to the same suit is beyond dispute. This is something which is done every day in every court in the land, and the filing of such a pleading is expressly authorized by Equity Rule 30.

This proposition has nothing to do with the question of the power of the court to permit *new* parties to intervene and introduce new claims against the orig-

inal defendant in a proceeding *in personam* without the issuance of new process as was the case in *Ex parte Indiana Transportation Company*, 244 U. S. 456, relied upon by counsel for petitioner. If that decision were applied as between the original parties to a suit and others who come in by consent of all concerned, it would deprive the courts of all power to do complete justice between parties and would nullify Equity Rules 30 and 31, a part of which for convenience we here quote:

Equity Rule 30.

> "The answer must state in short and simple form any counter-claim arising out of the transaction which is the subject matter of the suit, and may, without cross-bill, set out any set-off or counter-claim against the plaintiff which might be the subject of an independent suit in equity against him, and such set-off or counter-claim, so set up, shall have the same effect as a cross-suit, so as to enable the court to pronounce a final judgment in the same suit both on the original and the cross-claims."

Equity Rule 31.

> "If the counter-claim is one which affects the rights of other defendants they or their solicitors shall be served with a copy of the same within ten days from the filing thereof, and ten days shall be accorded to such defendants for

filing a reply. In default of a reply, a decree *pro confesso* on the counter-claim may be entered as in default of an answer to the bill."

The claim for petitioner amounts to this: That petitioner may intervene in the court below for the purpose of obtaining a money judgment against the defendant (either in its own name or in that of its representative, the Bondholders' Committee) upon bonds owned by intervenor, without submitting itself to the jurisdiction of the court so far as defendant's rights against it growing out of the same matter are concerned. Petitioner will, of course, concede that the court has jurisdiction to enter judgment against The Toledo, St. Louis & Western Railroad Company in the pending equity suit for the amount claimed on the bonds owned by the Rock Island Company and other bondholders who have deposited their bonds with the committee. The present contention of the Rock Island Company is that it may actively intervene for the purpose of bringing about such a judgment and that the defendant must submit to such a judgment and to the consequent sale of its property and destruction of its business without being permitted to assert as against the Rock Island Company its claim that the Rock Island Company, because of its fraud, in obtaining and dis-

posing of these very bonds, is liable over to The Toledo, St. Louis & Western Railroad Company. Petitioner would have a court of equity enforce the claims of the bondholders against The Toledo, St. Louis & Western Railroad Company and say to The Toledo, St. Louis & Western Railroad Company "These bondholders are here for the purpose of pursuing you, but you cannot pursue them even though your present liability grows out of the wrong of one of these very bondholders. You must submit to a sale of your property, the destruction of your business and the distribution of your assets to these bondholders, and then you must go to another district and there bring suit in a court of law for the recovery from the Rock Island Company of the damages which its fraud, in connection with the issuance of these bonds, has imposed upon you." The contention of petitioner is not only that a court of equity should so hold in the instant case, but that it is powerless in any circumstances to hold otherwise; that for it to attempt to protect the interests of the defendant by requiring the fraudulent wrong-doer to answer for his fraud in the pending litigation in which it has intervened is a usurpation of power by the court and an attempt to exercise jurisdiction in a matter wholly outside the scope of the court's jurisdiction. That this position of the petitioner is unsound, we submit is ob-

vious. A consideration of Equity Rules 30, 31 and 37, supra, and of the following authorities establishes not only that the court was acting within the limits of its judicial discretion in determining that the cross bill might properly be filed, but was moreover right in the conclusion reached.

Portland Wood Pipe Co. v. Slick Bros. Const. Co. et al., 222 Fed. 528 (D. C.).

In this case it was held that under Equity Rule 30 in a suit by a non-resident of the district to foreclose a mechanic's lien, in which suit the contractor and a sub-contractor, resident citizens of the district, were made defendants, and the sub-contractor by a cross-bill asserted a lien upon the property,

> "The court has jurisdiction over a counter-claim by the contractor against the subcontractor for moneys advanced and supplies furnished the subcontractor on account during the progress of, and for use in carrying on, the work, though the amount of the counter-claim exceeds the amount due the subcontractor, and has jurisdiction to render judgment against the subcontractor for the balance, under the rule that, where the court has jurisdiction of the controversy exhibited by the complaint, it may assume

jurisdiction to adjudicate incidental issues raised by cross-bills between defendants, regardless of citizenship or the amount in dispute."

(*Par. 1 of syllabus.*)

In the case of *Caflisch v. Humble*, 251 Fed. 1-4, the Circuit Court of Appeals for the Sixth Circuit reviewed the authorities and held that as defendant's counter-claim for damages for breach of the contract in question arose out of the transaction which was the subject matter of the suit, "Under the first clause of the second paragraph of Equity Rule 30 the defendant was required to set up its counter-claim or waive it."

The court further held:

"Whenever practicable to do so, a court of equity should do justice completely and not by halves. *Camp v. Boyd*, 229 U. S. 530, 551, 33 Sup. Ct. 785, 57 L. Ed. 1317; *Chicago, Mil. & St. P. Ry. v. United States*, 244 U. S. 351, 359, 37 Sup. Ct. 625, 61 L. Ed. 1184. The plaintiffs being non-residents of the district from which this case came, a peculiar equity runs in defendant's favor, and he should not be sent to a distant district to try out what ought rightfully to be determined in the original suit. *Rolling Mill Co. v. Ore & Steel Co.*, 152 U. S. 596, 616, 617, 14 Sup. Ct. 710, 38 L. Ed. 565; *Porter v. Roseman*, 165 Ind. 255, 260, 261, 74 N.

E. 1105, 112 Am. St. Rep. 222, 6 Ann. Cas. 718."

In *Williamson v. Collins*, 243 Fed. 835, C. C. A. Sixth Circuit, it was held that a decree should be entered on a cross bill against intervening bondholders requiring them to repay to the company the amount it was required to pay to holders for value of bonds originally issued to the intervenors without consideration. The district court had obtained jurisdiction and control of the company and its property and the Circuit Court of Appeals said at p. 840, "It was clearly within the power of a court of equity, under the circumstances, to fix the rights of the parties, both as against the company and its property, and, in relation thereto as between themselves," and further (par. 13 of the syllabus) that "Where persons to whom corporate bonds were issued as a bonus, with full knowledge of all the facts constituting the company's defense as to them, transferred the bonds to bona fide holders, their liability to the company was not limited to the amount received by them on the sale of the bonds, but extended to the face of the bonds and the matured coupons." See also—

Howard v. Leete, et al., 257 Fed. 918-22-3-4-5 C. C. A. 6th Circuit.

Springfield Milling Co. v. Barnard &

Leas Mfg. Co., 81 Fed. 261-4-5, C. C. A. 8th Circuit;

Approved in 251 *Fed.* 1, *Supra.*

Knupp et al v. Bell et al, 243 Fed. 157-161 C. C. A. 4th Circuit.

Paramount Hosiery Form Drying Co. vs. Walter Snyder Co. et al, 244 Fed. 192 (D. C.).

As the court (as we have shown) had jurisdiction (*a*) to find and determine that the Rock Island Company had entered its appearance and become a party, and (*b*) had jurisdiction to grant leave to the defendant to file a cross-bill against the Rock Island Company, there can be no question but that the court also had jurisdiction (*c*) to require the Rock Island Company to answer the cross-bill or suffer a decree *pro confesso.*

Equity Rule 31 contains express authority for such an order.

This rule was followed by the service of a copy of the cross-bill on the solicitor for the Rock Island Company and its receipt by him as such solicitor was duly acknowledged and proved to and found by the District Court. ' (Return, page 17.).

We now come to a specific reply to the points raised in the brief for petitioner.

The District Court Has Jurisdiction as a Federal Court.

The Toledo, St. Louis & Western Railroad Company is an Indiana Corporation. The Chicago, Rock Island & Pacific Railway Company is an Illinois corporation. The suit is pending in the Northern District of Ohio, of which neither is an inhabitant, and the Rock Island Company therefore claims that the court below is without jurisdiction of any controversy between them. The court below has found, however, that the Rock Island Company voluntarily submitted itself to the jurisdiction of that court; that it intervened and became a party to the suit on the creditors' bill against the Toledo, St. Louis & Western Railroad Company. The Rock Island Company has, therefore, waived the right to complain that the suit is not in the proper district.

Matter of Albert N. Moore, 209 U. S. 490;

Western Loan & Savings Co. vs. Butte & Boston Consolidated Mining Co., 210 U. S. 368;

Tate vs. Baugh, Sheriff, 252 Fed. 317-19.

If it be said that the Rock Island Company did not waive this jurisdictional question so far as the

cross-bill of the Toledo, St. Louis & Western Railroad Company is concerned, the answer is two-fold: (1) It is not possible for a party to consent that the court may have jurisdiction of his person for his protection, while, at the same time, withholding from the court jurisdiction of his person to protect the rights of other parties properly involved in the pending litigation. If this claim is made it amounts to saying that the Rock Island Company's entry of appearance in the case was wholly one-sided, and that a party may come into a court of equity and accept the benefits of its jurisdiction, and may, at the same time, escape its power so far as the rights of other parties are concerned. This is not the law.

> "A court of equity ought to do justice completely and not by halves."
>
> *Camp vs. Boyd*, 229 U. S. 530-551.
>
> 2d par. of Equity Rule 30.

The second answer to this claim, if made, is that the Rock Island Company not only entered a general appearance in the litigation prior to the filing of the cross-bill, but re-entered a general apearance to the cross-bill itself by the motion which it filed seeking to have the order requiring it to answer vacated, "On the ground that the court was without jurisdiction to make

said order or over this defendant as a party to said cross-bill." The fact that in this motion the Rock Island Company has stated that it appeared solely for the purpose of the motion "and not intending to submit itself to the jurisdiction of this court as a party to the suit" is of no importance, if, in fact, the action taken by it does constitute a submission of its person to the jurisdiction of the court. "A party cannot be at once in court and out of court. He may not, in the same breath, dispute the merits of the cause alleged against him and deny jurisdiction of the court over his person."

Crawford vs. Foster, 84 Fed. 939-941.

The claim in the motion "that the court was without jurisdiction to make said order" raised the question as to whether the court had jurisdiction, (*a*) over the subject matter as a Federal Court, and (*b*) over the subject matter as a court of equity. The claim in the motion that the court was without jurisdiction "over *this defendant* as a party to said cross-bill," recognizes the fact that the Rock Island Company is a defendant and does not raise the question of the residence of the Rock Island Company or of the service or lack of service of process upon it, or whether it has by its own action become a party, but raises only the point that the court had no jurisdiction over it as a party to the par-

ticular cross-bill filed by The Toledo, St. Louis & Western Railroad Company. This amounts to a demurrer for misjoinder of parties. Such a motion might well be made by one who was admittedly a party to the original litigation. It goes, not to the jurisdiction of the court over the person of the Rock Island Company, but to its jurisdiction over the subject matter.

The filing of a motion, which raises such questions has been held many times to constitute an entry of appearance and a waiver of the claim that the suit is pending in the wrong district.

Western Loan and Savings Co. vs. Butte and Boston Consolidated Mining Co., 210 U. S. 369-370-371-372.

Fitzgerald Construction Company vs. Fitzgerald, 137 U. S. 98-106.

Nelson vs. Husted, et al, 182 Fed. 921, 923, 924.

Crawford vs. Foster, 84 Fed. 939-941.

Mahr vs. Union Pacific R. R. Co., 140 Fed. 921.

For the foregoing reasons, therefore, we submit that there can be no question but that the court below as a Federal Court had jurisdiction to enter the order complained of.

Service of Process Is Not Necessary to Give a Court Jurisdiction Over the Person.

It needs no citation of authority to establish the proposition that a voluntary appearance by a party subjects his person to the jurisdiction of the court as effectually as if process had been issued and served upon him, but it is claimed by petitioner that this rule can have no application where the person who enters his appearance has not been named as a party in pleadings. No authorities are cited in support of this claim, and the contrary has been held by this court and others.

> "And although plaintiffs did not originally, or by amendment after answer, make him in terms a party to their bill, which would have disclosed that he was a citizen of New York, yet the effect of what was done was such as bound him by the decree, and *we think upon this record he must be held to have become such.* A person who has not been named as defendant to a bill may appear at the hearing, with the consent of all the parties to the cause, *Dyson v. Morris,* 1 Hare, 413, 419; *Bozon v. Bolland,* 1 Russ. & Myl., 69; and in this instance the objection of want of consent cannot be taken."
>
> *Anderson v. Watt,* 138 U. S., 694, 704.

"1. Parties having notice of the pendency of

a suit in which they are directly interested must exercise reasonable diligence in protecting their interests, and if instead of doing so they wilfully shut their eyes to the means of knowledge which they know are at hand to enable them to act efficiently, they cannot subsequently turn round and evade the consequences which their own conduct and negligence have superinduced.

"2. The term 'parties,' as thus used, includes all who are directly interested in the subject matter, and who had a right to make defense, control the proceedings, examine and cross-examine witnesses, and appeal from the judgment."

Robbins v. Chicago City, 71 U. S., 657 (4 Wall.).

"Such an appearance by attorney in open court without objection by any other party was effectual to make him a party to the proceedings."

In re Heldman's estate, 138 N. Y. S., 59, 153 Sup. Ct., App. Div., 583.

In *Wadley v. Blount, et al*, 65 Fed. 672, it was held by Goff, Circuit Judge, that one charged with fraud as was the Rock Island Company in the court below here, who appears before the master, although not named as a party, is "in effect a defendant to said suit."

"As Imhaeuser has appeared generally in the

suit, he has waived his right to object that he is not named as a defendant in the prayer for subpoena, and he has no concern with the naming of others in such prayer."

Buerk v. Imhaeuser, 8 Fed. 457.

In a creditors' suit such as this, "every creditor has an inchoate interest in the suit and is, in an essential sense, a party to the action."

Dobson v. Simonton, 93 N. C. 268.

"In all cases of this sort each creditor is entitled to appear before the master and may then, if he chooses, contest the claim of any other creditor in the same manner as if it were an adversary suit."

Story's Equity Jurisprudence, Sec. 745. (Fourteenth Ed.).

"Under such circumstances they are treated as parties to the suit."

Story's Equity Pleadings, Sec. 99 (Eighth Ed.).

"The practice of permitting judgment creditors to come in and make themselves parties to the creditor's bill, and so obtain the benefit, assuming at the same time their portion of the costs and expenses of the litigation, is well settled. And a proceeding of this sort will not be

reversed because the party so coming in has not obtained an order of court to come on; the want of such order not being objected to and the proceeding having gone on to its conclusion as if it had been obtained."

Myers v. Fenn., 5 Wallace, 205.

"Each creditor becomes a party to the suit, it is true, only *when he appears to prove his claim*. His right to proceed depends upon the fact of his being the owner of a valid claim against the corporation; but if he proves such a claim, then he does prove himself to be a creditor, and as such is entitled to come in under the decree, and has a right to be considered as a party complainant from the beginning by relation to the time of filing the bill."

Richmond v. Irons, 121 U. S. 27, 54.

"After a petition of intervention has been filed, and the issues raised thereon tried, an objection that there was no formal order of the court granting the intervener leave to intervene and file the petition will not be entertained."

People's Sav. Inst. v. Miles, 76 Fed. 252, 254, (C. C. A., 8th Cir.).

See also—

White v. Ewing, 159 U. S. 36-39.

Perry v. Godbe, et al, 82 Fed. 141 (D. C.).

French v. Gapon, 105 U. S. 509-525;
Illinois Steel Co. v. Ramsey, 176 Fed. 853-863, C. C. A. 8th Cir.

The case of *Merriam v. Saalfield*, 241 U. S. 22, relied upon by petitioner, is in no way in conflict with the foregoing cases and is not an authority supporting petitioner's contentions. The distinction between that case and the case at bar, is that there the plaintiff sought to maintain a supplemental bill against a person who had not entered his appearance and had not become a party and upon whom service could not be had within the district. In the case at bar, the Rock Island voluntarily appeared in its own name and in its own behalf and entered its appearance before the cross-bill was filed against it. In short, the distinction is that in this case the cross-bill was filed against a *party* while in *Merriam vs. Saalfield* the supplemental bill was filed against one *not* a party.

The point made by petitioner to the effect that its rights had been transferred to the bondholders' committee for the purpose of the suit, is, we submit, without merit, since the bondholders' committee could not represent innocent bondholders whose interests were opposed to those of the Rock Island Company on the issue of fraud raised by the answer of the stockholders'

committee. It was, therefore, proper for the Rock Island Company to intervene in its own behalf.

Williams v. Morgan, 111 U. S. 684, 696.

Hamlin v. Toledo, St. L. & K. C. R. Co., 78 Fed. 664-672, C. C. A. 6th Circuit.

Toler v. East Tennessee V. & G. Ry. Co., 67 Fed. 174; Lurtin, J.

Farmers' Loan & Trust Co. v. Northern Pac. R. R. Co., et al, 66 Fed. 169.

The record herein shows that all creditors were given leave by the District Court to intervene. It is true that the order fixed a time limit for such intervention, but as shown by the authorities hereinbefore cited, it was within the power of the court to extend this time limit, or even to ignore it if no party to the cause objected to an intervention perfected after the time limit had expired. That is what happened in the court below. The Rock Island Company was charged with fraud in the pleading filed by the stockholders' committee. Counsel for the bondholders' committee declined to act for the protection of the peculiar interests and rights of the Rock Island Company. Everybody in the case recognized that the Rock Island Company

must stand alone and nobody objected to its intervening. It might, of course, have allowed its interests to go unprotected and have refrained from appearing in the case. It saw fit, however, to appear in its own name and for its own protection, and manifestly for the purpose of combatting the claim of fraud asserted against it by the stockholders' committee and for enforcing its own bonds, if possible. If it had filed a pleading in its own name, it certainly would not be here in this court urging the present petition, for that would have furnished conclusive evidence that it had entered its appearance and made itself a party to the proceedings in the court below. The only reason it did not file a pleading was because its agent, the Bondholders' Committee, had filed one, of which it sought to take advantage.

The court below held that the steps which the Rock Island Company did take were as effectual to enter its appearance as if it had filed a pleading. The most that can be said for the pending petition, therefore, is that it seeks to obtain from this court a ruling that the court below erred in so holding. As the record is not here upon which the court below acted, it must be conclusively presumed that the evidence upon which it found that the Rock Island Company had entered its appearance was evidence justifying such finding. *In re Cooper,*

143 U. S. 472-506. The Rock Island Company having become a party to this suit, the court below had power to permit other parties in the suit to file amended pleadings, as was done with respect to the complainant, the stockholders' committee and The Western Union Telegraph Company, an intervening creditor, and to permit the defendant, which had not theretofore filed any pleading, to file an answer and cross-bill to the pleading which the bondholders' committee had filed in behalf of the Rock Island Company and certain other bondholders, and it was equally within the jurisdiction of the court upon proof that the Rock Island Company had notice of such new pleadings to require the Rock Island Company to answer them or suffer a decree *pro confesso*, and this, without the issuance of a subpoena. It is not necessary that a subpoena be issued upon the filing of amended pleadings or the filing of cross-bills against persons who are already parties to the pending litigation.

As we have shown, Equity Rule 31 provides what shall be done in such event, and was followed in the court below.

It follows from the foregoing that there is nothing in the fact that no subpoena was issued for the Rock Island Company upon the cross-bill which affects the jurisdiction of the District Court.

The Question as to Whether the Decision of the District Court Upon the Evidence, That the Rock Island Company Had Entered Its Appearance Was Right or Wrong Is Not Now Before This Court.

We have hereinbefore cited the decisions of this court establishing the rule that a writ will not issue in such a proceeding as this if the court had jurisdiction of the subject matter, even if its decision is apparently wrong.

In the present proceeding there is no record presented from which this court can determine that the decision of the court below was wrong. On pages three and four of the brief for petitioner we find some argument on the merits of the question as to whether the evidence showed that the Rock Island Company had entered its appearance, and on page four is the statement: "The only basis for the claim that the District Court has jurisdiction of the person of the Rock Island Company is that Mr. Maxwell entered its appearance by appearing as counsel for the bondholders' committee." (Return, page 21). This statement is denied in the return filed by the District Court, and it affirmatively appears in that return that the court received a great many items of evidence, of which the form of

Mr. Maxwell's original appearance was but one. As there is no record before this court of the evidence heard by the District Court, this court could not find, as claimed by the petitioner, that the decision of the court below was wrong even if this court under its practice could and would consider that question. The record here includes the finding of fact that the Rock Island Company did enter its appearance and this is conclusive on the present hearing.

> "* * * Where it appears that the court has jurisdiction of the subject matter, and that the defendant was duly served with process or voluntarily appeared and made defense, the decree is not open to attack collaterally."
>
> *In re Cooper*, 143 U. S. 472-506.

Its conclusion will therefore be conclusively presumed to be right.

> "The court had power to inquire into the fact upon which jurisdiction depended and its maintenance of jurisdiction involved the conclusion necessary to sustain it. If, therefore, the findings of fact are properly part of the face of the proceedings, the want of jurisdiction not only does not appear, but the contrary."
>
> *Ibid*, p. 509.

> "* * * We should be limited, on appeal,

in consideration of the case, to the question of law presented on the record.

"Upon the face of the libel, the facts found and the final decree the District Court clearly had jurisdiction. This petitioner had a remedy by appeal from that decree, which was inefficacious because of his neglect to have included in those findings the fact of the exact locality of the offense and seizure.

"Such being the case the writ of prohibition prayed for should not issue."

Ibid, 513.

The District Court Had Jurisdiction to Compel the Rock Island Company to Meet the Issues Tendered by a Cross-Bill Filed After It Had Entered Its Appearance.

If the contention of the petitioner were correct, cross-bills, set-offs and counter-claims would be unknown in Federal equity practice. All such cross-claims are ordinarily set up after the court has acquired jurisdiction of the party against whom they are asserted. Under equity rules 30 and 31 there can be no question but that a District Court proceeding in equity upon a creditors' bill may authorize the filing of a cross-bill, set-off or counter-claim, asserting for the first time a claim against the plaintiff or another defendant, as

the case may be, who has prior thereto come or been brought into the case. Petitioner's claim in this respect really amounts to nothing more than a claim that the court erred in permitting the filing of the particular cross-bill complained of by petitioner. As we believe we have shown, this point is not only not well taken, but could not possibly be considered by this court upon the present record.

We respectfully submit that the court below is proceeding strictly within the limits of its jurisdiction, in obedience to the rules prescribed by the Supreme Court for its guidance, and in accordance with ordinary equity practice, and that no reason is disclosed in the petition or by the brief for petitioner why the extraordinary remedy of a writ of prohibition or mandamus should be granted herein.

Respectfuly submitted,

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